Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

PUGET SOUND SHELLFISH GROWERS,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding, in conflict with decisions of other circuits and this Court, that a district court's ruling on the intended meaning of treaty language is a question of fact reviewed for clear error?

2. Whether the Ninth Circuit erred in holding that the equal footing doctrine had no application to the tribes' claim that they received easements in millions of acres of land under Puget Sound's navigable waters, when other circuits and this Court have held that the equal footing doctrine obligates a court to apply a strong presumption that the United States did not make a pre-statehood grant of rights in such lands in derogation of a future state's sovereignty?

3. Whether this Court should decide an open and important question and apply the equitable doctrine of laches, as suggested by four Justices in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 255 (1985) (Stevens, J., joined by Rehnquist, J., dissenting), in a case where the tribes delayed 135 years before claiming a treaty right to enter and take shellfish from privately owned shellfish farms, labored upon for generations with no notice of the claimed treaty right?

PARTIES AND RULE 29.6 LISTING

The parties to the proceedings below were:

Petitioners: The Puget Sound Shellfish Growers Association ("Growers"), intervenor-defendants/ appellants below, consists of Taylor United, Inc.; Olympia Oyster Company; G.R. Clam & Oyster Farm; Cedric E. Lindsay; Minterbrook Oyster Company; Charles and Willa Murray; Skookum Bay Oyster Company; and J & G Gunstone Clams, Inc.

Respondents:

a. State of Washington, which was aligned as defendant/appellant below.

The following three separate groups of private property owners were aligned as intervenor-defendants/appellants below, including:

b. "Private Owners" Larry B. and Shirlee Alexander, Harold E. and Billie B. Bauer, James and Ann Carter, William J. and Jeanette Chase, Mrs. Frances A. Fellows, George L. Grader, Earl D. and Millicent Ann Hunsperger, Edward B. and Eleanor J. Krenz, H.J. Merrick, Gordon W. Moss, Sewall L. and Emma M. Reynolds, John D. Riach, Alva Hazel B. Robb, Irene D. Smith and Providence Worley.

c. "Private Owners" William and Charmond Adkins, Grace Boyd, Pierce W. and May H. Davis, Ms. Rosemary Duncan, James E. Hadley, James C. and Sarah H. Johnston, William and Jo Ann

Kirsh, David A. Mitchell, Mr. Louis Nawrot, Robert and Sandra Stevenson, and Boon Ho Woo.

d. "26 Tideland and Upland Private Property Owners of Washington", Dan Buehler, Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hotts, Keith C. Heutson, Commander John C. James, Richard Sayre Koch, Elaine C. Lefler, Joan Lemonds-Roush, John S. Lewis, Steven L. Luke, Edwards R. McMillan, Robert F. Newman, Mark A. Hysether, Arthur I. Price, Ray D. Randall, Cynthia Rasmussen, Robert G. Shanks, Axel Strakejahn, Leana Tracy, Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker, and William E. Whitney, Jr.

e. The plaintiffs, who were appellees/cross-appellants below, are the United States and certain Indian tribes: Muckleshoot; Nooksack; Upper Skagit; Squaxin Island; Lummi; Makah; Tulalip; Swinomish; Quileute; Puyallup; Hoh; Suquamish; Confederated Tribes & Bands of the Yakama Indian Nation; Nisqually; Jamestown S'Klallam; Lower Elwha Klallam; Port Gamble S'Klallam; Skokomish; Sauk-Suiattle; and Stillaguamish.

There are no parent companies or subsidiary companies with respect to the Growers. Supreme Court Rule 29.6

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OPINIONS BELOW

The Ninth Circuit's initial opinion is reported at 135 F.3d 618. Its amended opinion, granting a timely petition for rehearing and denying a suggestion for hearing en banc, was filed September 25, 1998, and is reported at 157 F.3d 630. Appendix ("App.") at A1-49. The opinions of the district court (W.D. Wa.) are reported at 873 F. Supp. 1422, App. at B1-43; 898 F. Supp. 1453, App. at C1-42; and 909 F. Supp. 787, App. at D1-13.

JURISDICTION

The Ninth Circuit entered its final judgment on September 25, 1998. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C. § 1254.

TREATIES INVOLVED

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 26, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty of Olympia, July 1, 1855, 12 Stat. 971. App. at J1-N7.

STATEMENT OF THE CASE

Petitioners, the Puget Sound Shellfish Growers Association (the "Growers"), are commercial shellfish farmers. Emblematic of the hundreds of such farmers who cultivate shellfish up and down Puget Sound are Growers such as Cedric Lindsay who has farmed oysters for 43 years on two small tideland parcels adjoining his home, and Taylor United, Inc., a five-generation, family-run company employing 165 people and selling shellfish worldwide. Among other Growers is the Olympia Oyster Company, which was first incorporated in 1878; its present farm includes tidelands originally granted by the territorial legislature in 1864. Glen Rau, who owns G.R. Clam & Oyster Farm, is a fifth-generation Grower whose family has farmed shellfish since 1900. His great-great-grandfather acquired his first tideland parcel from a member of the respondent Squaxin Island Tribe.

The Growers own their tidelands in fee simple by virtue of grants from the state of Washington. In some

instances, the Growers' tidelands are not naturally productive but contain shellfish solely as a result of the Growers' cultivation activities. In other instances, the Growers' tidelands naturally produce shellfish but the Growers augment that production by a variety of cultivation techniques.

The Ninth Circuit ruled in this case that provisions in five treaties securing to the tribes the "right of taking fish at all usual and accustomed grounds and stations" gave the tribes the right--first asserted 135 years after the treaties were ratified by the United States Senate--to enter the Growers' privately owned tidelands and harvest shellfish from beds cultivated or staked by the Growers. The court reached this conclusion despite a Shellfish Proviso in each treaty that explicitly stated the contrary:

> Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

The Ninth Circuit recognized "the enormous impact our decision will have on the thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region." App. at A42. With regard to the Growers' laches argument, the court also conceded that the "equities do weigh heavily in favor of the Growers' argument." App. at A28.

Nevertheless, the Ninth Circuit authorized the tribes to enter the Growers' private land and harvest from beds cultivated by the Growers. In so doing, and in conflict with the decisions of four other circuit courts and this Court, the court abdicated its responsibility to review the

intended meaning of treaty language as a question of law and instead deferred to a supposed factual finding by the district court that the parties intended the Proviso to mean something other than what is indicated by its plain language. In conflict with the Tenth Circuit's and this Court's opinions, the court also refused to apply established principles of the equal footing doctrine, which requires that the Proviso be interpreted in light of a strong presumption that the United States did not intend to make a pre-statehood conveyance of rights in the state's sovereign lands under navigable water. Finally, the court did not apply the doctrine of laches, even though the tribes waited 135 years to assert their treaty claims.

The Ninth Circuit's decision undermines principles of federalism and disrupts long-standing property rights, transferring to the tribes the fruits of the Growers' substantial investments in shellfish cultivation. As Judge Beezer recognized in his concurrence, this case warrants Supreme Court intervention to ensure "survival of Washington's shellfish industry." App. at A46.

Over the past century, this Court has considered the Indian treaties at issue in this petition in seven opinions, beginning in 1905 and most recently in 1979.[1] Under

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[1] *United States v. Winans*, 198 U.S. 371 (1905); *Seufert Bros. v. United States*, 249 U.S. 194 (1919); *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

the treaties, the tribes secured their aboriginal "right of taking fish, at all usual and accustomed grounds and stations." *Fishing Vessel*, 443 U.S. at 674. Each of this Court's seven opinions has focused solely on the tribes' fishing right to take anadromous fish (salmon and steelhead). *Id.* at 665 n.6. Not one of this Court's seven salmon opinions has addressed or interpreted the Proviso. Unlike the right to take salmon, the tribes did not secure all of their aboriginal right to take shellfish at their usual and accustomed grounds and stations: the tribes ceded to the United States their aboriginal right to take shellfish at those places if they were "staked or cultivated by citizens."

The Ninth Circuit rejected the Proviso's plain meaning, which protected from tribal harvest any beds that the Growers had staked or cultivated. Instead, the court deferred to the district court's conclusion that the United States intended the Proviso to incorporate for all time a rule of law prohibiting staking or cultivating of natural beds of shellfish. The court ruled, based on a non-uniform rule of state law on the east coast in the 1850s, that the Proviso was intended to protect from tribal harvest not "*any beds* staked or cultivated by citizens," as the plain language of the treaty provides, but only "artificial" beds—namely, beds that did not contain a natural bed (defined as a commercial density of shellfish) when cultivation began. App. at A26, A35.

A. The Growers Bought and Cultivated Their Lands in Reliance on the Proviso.

The Growers cultivate a portion of the millions of acres of Puget Sound's bedlands and its 2227 miles of tidelands. App. at C8. For 135 years after the treaties

were entered, the Growers purchased and then cultivated their tidelands without any notice of a claimed treaty right. App. at C3 (the "Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property"). Relying on the state's fee title as the source of their property, the Growers have cultivated shellfish on their tideland farms.

Dependent on the fluctuating tides, the Growers labor at any time of day or night to cultivate their crops. The Growers till and bank their soil. They remove predators. They gravel the tidelands for better growing conditions and to better catch or "cultch" free-floating shellfish larvae. They seed their farms with young shellfish raised in nurseries or captured in the wild. They break up and move their oysters around their farms for better growth and marketability. It is undisputed that these labors have vastly increased the productivity of the Growers' farms. All of these activities, while assisted today by modern technology, are identical to the cultivation activities of nineteenth century shellfish farmers. *Compare* Exhs. D-004, D-113, and D-132 *with* Exhs. D-481 to D-488.

Given the enormous investment of labor and money in their farms, the Growers excluded all others from entering their land and taking their crops. The financially crippling effect of allowing others to enter private farms and take a portion of the Growers' crops is self-evident. *See, e.g.*, Testimony of Jim Edwards, Tr. at 657 (If the tribes are entitled to 50% of his crops "it will be pretty drastic for me. I'm--I think within a fairly short period of time, I would be bankrupt.").

B. The Indians Understood the Proviso's Plain Meaning.

The Indians at treaty time understood the concepts of staking and cultivating. The Indians themselves cultivated resources, including shellfish. GER 32-34. The Indians themselves requested that the settlers stake their lands. ER 733. The tribes' own witness testified that the concepts of staking and cultivating were easily explained in the Chinook jargon used to explain the treaties to the Indians. Tr. at 337. That same witness testified that the Indians could not have understood, and would have been very confused by, any attempt to explain east coast shellfish law. *Id.*

The Indians' post-treaty conduct also reveals that they understood the Proviso's plain meaning. Not once in the 135 years after the treaties were ratified did the Indians protest the Growers' activities or seek to enter their farms and take their shellfish. Indeed, before this case was filed in 1989, the Indians and their agents agreed that the Proviso has its plain meaning. The tribes' primary expert in the salmon cases, Dr. Barbara Lane, testified in an earlier trial that the Indians understood they could lose a "treasured shellfish bed" because settlers could stake or cultivate such beds "anywhere." GER 17. Similarly, the Suquamish Tribe previously admitted in briefing to the Ninth Circuit that "[u]nlike the in common shellfish right, the in common salmon right is not defeasible by staking or cultivating." GER 2.

C. The Lower Court Rulings.

Against this backdrop of settled property interests and the uniformly understood plain meaning of the

Proviso, the Ninth Circuit interpreted the treaties. It did so by ignoring the Proviso's plain meaning and erroneously deferring to the district court's conclusion that the parties intended the Proviso's meaning to incorporate a non-uniform rule of state law in the east.

At treaty time, most but not all states on the east coast prohibited shellfish farmers from staking or cultivating natural beds of shellfish. Based on the law in those states, the district court ruled that the Growers had the property right to exclude Indians from the Growers' farms and to prevent them from taking their crops only if the Growers' shellfish beds were "artificial," i.e., only if the beds did not contain a commercially harvestable quantity of shellfish when cultivation began. App. at B27-28, C10-11. After a second trial to determine how to implement the treaty right, the district court ruled that changes in the tidelands since treaty time made it virtually impossible to determine whether the Growers had started their farms on "natural" or "artificial" beds. App. at C13-14. Accordingly, the district court ruled that all of the Growers' cultivated shellfish beds were "de facto" artificial, thereby protecting the fruits of the Growers' labors from tribal harvest. App. at C12-13.

On appeal, the Ninth Circuit affirmed the trial court's interpretation of the Proviso, but reversed the trial court's ban on tribal harvest from the Growers' farms. App. at A29-32. The Ninth Circuit held that the tribes had no right to take shellfish from "artificial" beds, but that they were entitled to take from the Growers one-half of the natural background amount of shellfish that existed on "natural" beds at the time cultivation began. App. at A34. The Ninth Circuit allocated to the Growers the burden of proving that their

beds were "artificial." App. at A34-35. If the Growers are unable to prove their beds were "artificial" when cultivation began, sometimes over 100 years ago, the tribes have a right to a portion of the Growers' crops. If they are unable to prove a bed is "artificial," the Growers then bear the additional burden of proving the quantity of shellfish that existed on that bed when cultivation began. App. at A34-35. Judge Beezer rightly termed these burdens on the district court and the Growers "daunting" and "heavy." App. at A45.

The Ninth Circuit judgment upsets settled interests in private property and adversely affects the livelihood of the Growers and their employees. As Judge Beezer stated in his concurring opinion, the judgment "trample[s]" on "property rights, so fundamental to American government." App. at A46. Judge Beezer's concurrence invited this Court to grant the writ because the "[s]urvival of Washington's shellfish industry depends upon the growers' ability to dedicate tidelands to exclusive use." App. at A46.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's judgment, allowing the tribes to enter private tidelands and take crops from the Growers' shellfish farms invested in and labored upon for generations, will cripple or destroy the Growers and the very shellfish industry that the Proviso was designed to protect. The judgment also does great violence to the settled and reasonably relied upon property rights of the Growers and thousands of other Washingtonians who own tidelands on Puget Sound.

The petition also should be granted because the Ninth Circuit's judgment is in direct conflict with other circuits' and this Court's decisions in two ways.

First, the Ninth Circuit only reviewed the district court's conclusion on the meaning of the Proviso intended by the United States and the tribes for clear error, in direct conflict with the decisions of other circuits and this Court that an appellate court must subject a treaty's intended meaning to plenary and searching review. *See, e.g.*, *Fishing Vessel*, 443 U.S. 658 (treaty's intended meaning subjected to searching review with no deference to trial court ruling on intended meaning of treaty language); *Rainbow Navigation, Inc. v. Department of Navy*, 911 F.2d 797 (D.C. Cir. 1990) (same); *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (same); *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (same); *Kreimerman v. Casa Veerkamp, S.A.*, 22 F.3d 634 (5th Cir. 1994) (same).

Second, the Ninth Circuit's judgment has shorn the state of Washington of its equal footing right to fashion its own tidelands policy, which for nearly a hundred years permitted sale of tidelands and shellfish beds to the Growers. In direct conflict with the decisions of other circuits and this Court, the Ninth Circuit refused to apply the equal footing doctrine and the state of Washington now stands alone and unequal among the states, deprived of a fundamental and essential attribute of its sovereignty, the sovereign right to control its policy over millions of acres of its lands under navigable waters. This Court's review of the Ninth Circuit's refusal to apply the equal footing doctrine is particularly appropriate given the vast expanse of land at issue, an area greater than the combined area of the states of

Delaware and Rhode Island, as well as the thousands of people affected by the judgment.

The Growers also ask this Court to decide the important and unresolved question left open by the opinions in *Oneida* of whether the tribes' 135-year delay in asserting easements to enter the Growers' farms and take the Growers' shellfish should bar the tribes' claim under the equitable doctrine of laches. In keeping with the principles articulated by Justice Stevens in his *Oneida* dissent, this Court should apply laches to bar a claim that destroys the Growers', and thousands of other Washingtonians', reasonable and settled expectations in the exclusive use of their property.

I. IN CONFLICT WITH OTHER CIRCUITS AND THIS COURT, THE NINTH CIRCUIT ABDICATED ITS PROPER ROLE OF PLENARY REVIEW OF THE INTENDED MEANING OF TREATY LANGUAGE.

The Ninth Circuit's decision created a conflict with the decisions of other circuits and this Court when it held that the district court's conclusions regarding the "intentions of the parties' negotiators" were to be reviewed under the "deferential" clear error standard of review. App. at A16, A26.

Reviewing the intention of the parties for clear error is an improper abdication of the role of an appellate court because the intentions control the meaning of the treaty. As this Court said in *Fishing Vessel*, "it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties." 443 U.S. at 675. *See also United States v.*

Choctaw Nation, 179 U.S. 494, 531 (1900) ("All agree that as a general rule in the interpretation of written instruments the intention of the parties must control, and that such intention is to be gathered from the words used . . ."). If the intentions of the United States and the tribes are reviewed only for clear error, treaty interpretation becomes a question of fact. It is precisely to avoid that result that other circuits and this Court have exercised searching and plenary appellate review of the intended meaning of a treaty, even if a district court ruled that the parties "intended" a particular meaning.

That other circuit courts and this Court have always conducted a plenary review of the intended meaning of a treaty should come as no surprise. Treaties, which must be signed by the President and ratified by the Senate, U.S. Const. art. II, § 2, are interpreted like statutes. *United States v. Alvarez-Machain*, 504 U.S. 655, 663-65 (1992) (analogizing process of interpretation of treaties and statutes and analyzing language of treaty and the "history of [the] negotiation"); *Cannon v. United States*, 973 F.2d 1190, 1192 (5th Cir. 1992) ("Courts construe treaties just as they do statutes.") (citing *Alvarez-Machain*). The interpretation of a statute and Congress' intent in enacting it are, of course, questions of law. *See, e.g., Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995); *Blum v. Stenson*, 465 U.S. 886, 896-97 (1984).

No appellate court would defer to a district court's "findings" on legislative history nor would one consider deferring to a district court's "finding" that Congress intended a statute to have a particular meaning. Yet, in conflict with numerous courts of appeal and this Court, the Ninth Circuit did exactly that when it deferred to the

district court's "findings" on the Proviso's intended meaning.

A. The Conflict.

The Ninth Circuit's deference to the district court's conclusions on the Proviso's intended meaning conflicts with the opinions of four other circuits.

In *Rainbow Navigation, Inc. v. Department of Navy*, 911 F.2d 797 (D.C. Cir. 1990) (D. Ginsburg, J., joined by then-Judge R.B. Ginsburg), the D.C. Circuit rejected the district court's conclusion that a treaty with Iceland had a particular intended meaning in light of statements made by Executive officials in the legislative history. *Id.* at 798. The court independently reviewed the treaty language along with the legislative history of the Senate ratification proceedings and, paying no deference to the trial court's ruling, reversed. *Id.* at 802.

In *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988), the Third Circuit reviewed a district court's ruling on the intended meaning of a treaty between the United States and Korea. Defining its role as "limited to ascertaining and enforcing the intent of the treaty parties," *id.* at 1143, the court conducted a searching review of the "history of the negotiations" to discern the meaning that "the signatories intended," *id.* at 1144-45. After plenary review, the court rejected the district court's conclusion regarding what the negotiators intended the treaty to mean and reversed. *Id.* at 1145-46.

In *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996), the Fourth Circuit reviewed the district court's determination of the intended meaning of language in the

Vienna Convention. The Fourth Circuit stated that it was required to conduct a de novo review of the treaty's meaning and that the treaty "should be construed to give effect to the intent of the signatories." *Id.* at 537. In so doing, the court considered "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* Paying no deference to the district court's rulings, the court then made its own determination of the treaty meaning "intended by the signatories." *Id.* at 538.

In *Kreimerman v. Casa Veerkamp, S.A.*, 22 F.3d 634 (5th Cir. 1994), the Fifth Circuit reviewed the district court's judgment on the intended meaning of a treaty. The court deemed "inconsequential" its inability to discern the basis for the district court ruling, because the intended meaning of treaty language requires plenary review. *Id.* at 639. The court then extensively canvassed the "language, history, and purpose" of the treaty, *id.* at 638, to determine the treaty's intended meaning, including "non-textual" evidence of intent, *id.* at 642, and reversed.[2]

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[2] The Ninth Circuit created a related conflict with the Fifth Circuit when it evaluated evidence extrinsic to the treaty language before first considering whether that language was ambiguous on the face of the treaty documents. *Kreimerman* holds that examination of extrinsic evidence is inappropriate absent a finding of ambiguity on the face of the treaty. 22 F.3d at 638. The Ninth Circuit's approach conflicts with that holding, conflating the evaluation of extrinsic evidence with the initial determination of whether the treaty is ambiguous on its face. *See also United States v. Stuart*, 489 U.S. 353, 370 (1989) (Kennedy, J., joined by O'Connor, J., concurring) (there is no need to look to nontextual sources to determine treating parties' intended meaning because

Like these circuit courts, this Court has repeatedly made clear that the intended meaning of treaty language is a question of law. When reviewing lower court rulings on the meaning of language intended by the treating parties, this Court has paid no deference to the lower courts and has conducted its own independent and searching review to determine the meaning of treaty language intended by the parties. *See, e.g.*, *Air France v. Saks*, 470 U.S. 392, 399 (1985) (looking to negotiating history and stating that "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"); *Fishing Vessel*, 443 U.S. at 674-79 (extensively canvassing the record of treaty meaning and ruling on treaty meaning independently of determinations made by lower courts); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (same).

The Ninth Circuit fell into error because it posited a distinction between appellate review of the United States' and tribes' intended treaty meaning, on the one hand, and appellate review of the treaty's legal meaning, on the other hand. App. at A16. ("We therefore review for clear error all of the district court's findings . . . regarding the treaty negotiators' intentions. We then review de novo whether the district court reached the proper conclusion as to the meaning of the Shellfish

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"[t]he intent of the Treaty signatories is manifest from the language of the document itself"); *id.* at 371 (Scalia, J. concurring) ("the Treaty's language resolves the issue presented, there is no necessity of looking further to discover the intent of the Treaty parties"); *Garcia v. United States*, 469 U.S. 70, 75 (1984) (Rehnquist, J.) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.")

Proviso given those findings."). This distinction and the two-step review process hypothesized by the Ninth Circuit, however, are entirely illusory. As discussed above, the intended meaning and the legal meaning of the treaty are the same issue. Indeed, in the decision that the Ninth Circuit reviewed for clear error in this case, the district court treated the parties' intentions and the treaty meaning as the same question. *See* B4 ("the parties' intentions dictate the interpretation of a treaty").

The best illustration that the Ninth Circuit's second step of "de novo" review is wholly illusory is found in the court's own statement of its holding: "*Given the deferential standard* by which we review the district court's findings of historical fact *and* its findings regarding the intentions of the parties' negotiators, we conclude the district court did not *err* in *interpreting* the Proviso and we adopt its analysis as our own." App. at A26 (emphasis added). As this language makes clear, because of the "deferential standard" it employed, the court reviewed the district court's interpretation of the Proviso only for clear error. It never conducted a de novo review because, once it had deferred to the district court's "findings regarding the intentions of the parties' negotiators," *id.*, there was no interpretation left to be done. *Fishing Vessel*, 443 U.S. at 675 ("it is the intention of the parties . . . that must control any attempt to interpret the treaties").

Importantly, this is not an isolated error by the Ninth Circuit. The court felt compelled to defer to the district court based on the court's earlier opinion in *Confederated Tribes v. Washington*, 96 F.3d 334 (9th Cir. 1996), *cert. denied*, 520 U.S. 1168 (1997). Thus, the Ninth Circuit is now routinely applying an erroneous

standard of review to an important category of cases affecting many people. *See also Cree v. Flores*, 157 F.3d 762, 774 (9th Cir. 1998) (reviewing for clear error the district court's conclusion on the meaning of treaty language intended by the parties as factual findings determinative of treaty meaning: "The district court undertook a careful inquiry into the intentions of the parties at Walla Walla and, given the evidence, its interpretation [of the treaty] is certainly plausible.").

The effect of the Ninth Circuit's erroneous standard of review is severe. The Ninth Circuit has effectively ceded control over interpretation of treaty language to the district courts. This is so because a trial court ruling that the tribes and the United States intended a treaty to mean X will, if such a ruling is deemed a "factual" finding reviewed for clear error, virtually require the reviewing court to affirm that the treaty means X. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

The Ninth Circuit's holding affects every case in the western states, a circuit where this Court's seven salmon opinions show that the meaning of Indian treaties is a subject of great importance and much litigation. The importance of Indian treaty interpretation to countless people in the Ninth Circuit, including numerous Indian tribes, is manifest. Given the importance of treaty interpretation, this Court should grant the writ to resolve the conflict and make clear that the question of treaty meaning requires more than appellate deference to a

"plausible" treaty meaning based upon district court "findings" that the treating parties intended that meaning. Just like the intended meaning of statutes, the meaning of the Proviso intended by the United States and the tribes requires thorough and searching appellate review, such as the review this Court conducted in *Fishing Vessel*. Only then will important questions concerning the meaning of treaties, including their effect on settled property interests, receive the proper measure of judicial scrutiny.

B. The Plain Meaning Should Control.

The Ninth Circuit's adherence to a clear error standard had a significant impact on the resolution of this case. If the meaning of the treaty intended by the parties had been subjected to plenary review, as would have been done in the D.C., Third, Fourth, and Fifth Circuits, the district court's conclusion on the meaning of the Proviso--that treaty language barring harvest from "any beds staked or cultivated by citizens" was intended by the parties to exclude tribal harvest from just some beds, "artificial" ones--would have been reversed.

First, the interpretation accepted by the trial court and deferred to by the Ninth Circuit fails to give the phrase "any beds staked or cultivated by citizens" its plain meaning. Any beds means any beds, not just some beds. It does not matter whether the Growers have staked or cultivated on a "natural" or an "artificial" bed when the undisputed evidence is that they have engaged in both activities. The Ninth Circuit failed to give the simple words of the Proviso their plain meaning, in violation of *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be re-written or

expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.").[3]

Second, the judgment is predicated upon the "highly dubious assumption," *Fishing Vessel*, 443 U.S. at 677 n.23, that the treaty makers intended to incorporate the intricacies of east coast state law into the meaning of the treaties. In *Fishing Vessel*, this Court counseled against this very reasoning and rejected it. *Id.* It should have been rejected here. *Id.* at 676 (An Indian treaty " 'must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.' ") (citation omitted).

Third, the actual conduct of the parties for 135 years after the Senate ratified the treaties permits only one conclusion--everyone understood the Proviso's plain meaning. It is undisputed that for 135 years the Indians and the settlers alike understood that Indian access to shellfish could be and would be diminished as tidelands and bedlands were staked or cultivated. The tribes' own lawyers and witnesses admitted that the Proviso allowed

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[3] Because the Proviso's meaning is plain, a review of the parties' conduct to shed light on the meaning of the treaties is unnecessary. Nevertheless, the parties' conduct corroborates the plain meaning of the Proviso. *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("[E]ven though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims.") (internal citations omitted).

Indians to lose "treasured shellfish beds," as settlers could stake or cultivate "anywhere." The Indians were silent for 135 years because they knew and understood the Proviso's plain meaning that natural beds of shellfish were subject to being claimed by settlers.

II. THE JUDGMENT CONFLICTS WITH THE EQUAL FOOTING JURISPRUDENCE OF OTHER CIRCUITS AND THIS COURT.

A. The Equal Footing Doctrine Protects the Federalism Interest in Permitting Each State to Fashion Its Tidelands Policy to Allow Selling Those Lands to Private Owners.

Because ownership of land under navigable waters "uniquely implicate[s] sovereign interests," *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2041 (1997), this Court has held for over 150 years that courts faced with the question whether the United States made a pre-statehood grant or reservation of right in land under navigable water must begin with a strong presumption against the grant or reservation and in favor of state ownership.

> A court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms

> embraces the land under the waters of the stream.

Montana v. United States, 450 U.S. 544, 552 (1981) (internal citations omitted). *Accord Shively v. Bowlby*, 152 U.S. 1, 52 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).

Our federal system compels the stringency of the "strong presumption" against finding an exercise of the United States' power to defeat a future state's control over its sovereign lands. The Constitution mandates "a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). Thus, a state's title and equal footing right to its "sovereign lands" under navigable water "arises from the equal footing doctrine and is conferred not by Congress but by the Constitution itself." *Idaho*, 117 S. Ct. at 2041 (citation omitted).

In line with this Court's 150 years of equal footing jurisprudence, other courts have consistently applied the equal footing doctrine and applied the strong presumption against pre-statehood grants of land under navigable water. *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983) (applying equal footing doctrine to tribal claim to levy fees on non-tribal members fishing in tribal waters); *James v. State*, 950 P.2d 1130 (Alaska 1997) (applying equal footing doctrine to decide ownership of lands under navigable waters). The Ninth Circuit should have done likewise, and applied the "strong presumption" that the United States did not intend to create the claimed easements. *See also Shively*, 152 U.S.

at 10 (under the equal footing doctrine, a grant of an interest in land will be found only if it is an "unavoidable construction"); *Massachusetts v. New York*, 271 U.S. 65, 89 (1926) (same).

B. The Ninth Circuit's Refusal to Apply the Equal Footing Doctrine Further Conflicts With Decisions of the Tenth Circuit and This Court.

The Ninth Circuit distinguished away this long line of authority on two grounds. First, it held that the equal footing doctrine applies only to claims that the United States conveyed fee title or full beneficial ownership and not to claims that the United States conveyed only easements. App. at A21-22. Second, it held that the doctrine does not apply because the tribes claim that their right to take shellfish was "reserved" by them rather than granted by the United States. App. at A21-22. The two grounds relied upon by the Ninth Circuit to avoid the equal footing doctrine are in direct conflict with the law in the Tenth Circuit and this Court.

The Ninth Circuit's judgment that the equal footing doctrine does not apply to "reserved" rights of less than full fee title conflicts with the Tenth Circuit's opinion in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). In *Repsis*, the tribe claimed a "reserved" treaty right to hunt on unoccupied land. *Id.* at 986. The Tenth Circuit applied the equal footing doctrine to interpret the claimed "reserved" hunting right. *Id.* at 992-93. The Tenth Circuit also applied the equal footing doctrine even though the tribe did not claim fee title to the land. *Id. Repsis* is in direct conflict with the Ninth Circuit's

judgment that the equal footing doctrine has no application either to "reserved" treaty rights or to claimed treaty rights of less than full fee title.[4]

The decisions of this Court also hold that the "strong presumption" of the equal footing doctrine cannot be circumvented by holding that it applies only to fee title or full beneficial ownership and not to easements. This Court was clear in *Shively* that the purpose of the doctrine was to leave "the administration and disposition of the sovereign *rights* in navigable waters, and in the soil under them, to the control of the states." 152 U.S. at 58 (emphasis added). Moreover, as this Court made clear in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), an easement is no less a constitutionally protected property interest than is full beneficial ownership. *Id.* at 831 (noting that the right to control access to land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property") (citations omitted).

Failing to apply the equal footing doctrine to an easement for purposes of taking shellfish would be particularly incongruous because the sovereign interests

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[4] In *Repsis*, the court held that Wyoming's admission into the Union on an equal footing extinguished the tribe's hunting right because it was a "temporary and precarious" right, valid only while the land was not occupied. 73 F.3d at 991. The tribes' right to take shellfish in this case is certainly as precarious. It existed only until the beds were "staked or cultivated." Indeed, the tribes themselves admit that their claimed right to take shellfish is precarious and defeasible because they concede that shellfish beds may be destroyed for tideland filling and development. App. at B21-22.

in tidelands protected by the "strong presumption" are the state's control of navigation and fishing. *Shively*, 152 U.S. at 49 ("The title to the shore and lands under tide water . . . 'is regarded as incidental to the sovereignty of the state--a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.' ") (quoting *Hardin v. Jordan*, 140 U.S. 371, 381 (1891)). *Cf. Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842) (noting that grants of interest in an oyster fishery in land under navigable water are "construed strictly" and will not be found without "clear and especial words" granting that sovereign interest).

The Ninth Circuit's decision that the equal footing doctrine applies only to claims of fee title or full beneficial ownership is also in direct conflict with *Winans*, 198 U.S. 371. In *Winans*, this Court *applied* the equal footing doctrine to the question whether the fishing clause in the Yakama Treaty "created" easements in the shorelands of the Columbia River at the traditional sites where Indians had stood to catch fish in the river. *Id.* at 381-83. No claim to fee title or full beneficial ownership was at issue in *Winans*, only claimed easements, yet this Court followed *Shively* and applied the equal footing doctrine.

Similarly, the Ninth Circuit's refusal to apply the equal footing doctrine, because the tribes' fishing rights were "reserved," directly conflicts with this Court's prior decisions. The easements claimed by the tribes can exist in one of only two ways. They were either granted (or in *Winans'* words "created") to the tribes or they were reserved to the United States for the tribes' beneficial

use.[5] Either way, this Court's cases squarely require application of the equal footing doctrine.

In *Winans*, the very case identifying the tribes' fishing right as a "reserved" right, this Court *applied* the equal footing doctrine to determine whether the treaty "created" a shoreland easement and an access easement to that shoreland site. 198 U.S. at 381-83. In *Utah v. United States*, 482 U.S. 193 (1987), this Court applied an even more stringent equal footing test to a claim that the United States had reserved to itself land under a navigable lake in the Utah territory. Likewise, in *Montana* this Court applied the equal footing doctrine to the tribe's claimed reserved interest in land under navigable waters. 450 U.S. at 550-57. *Winans*, *Utah* and *Montana* flatly contradict the Ninth Circuit's decision that it need not apply the equal footing doctrine because the tribes claim "reserved" easements.

Applying the equal footing doctrine to the meaning of the Proviso was the task for the Ninth Circuit in this case. In conflict with other circuits and this Court, the Ninth Circuit refused to perform this analysis. If the Ninth Circuit had applied the equal footing doctrine in this case, as the Tenth Circuit did in *Repsis*, the result undoubtedly would have been different. The very language of the Proviso, barring the tribes from taking

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[5] If the United States neither granted the easements to the tribes nor reserved them to itself for the tribes' use, then the tribes claim no more than a "reserved" aboriginal right. Any such reserved right, however, has been lost by nonuse. *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917) (holding that treaty's reserved aboriginal right of occupancy had been lost through nonuse).

shellfish from "any beds staked or cultivated by citizens," demonstrates that there is no intention, much less an intention in "clear and especial words," to grant the tribes permanent easements in all of Puget Sound's tidelands and bedlands for purposes of taking shellfish.[6]

C. The Ninth Circuit Ignored This Court's Equal Footing Cases When It Broadly Construed the Scope of the Easements.

Even if one disregards the Proviso's plain meaning and assumes that the tribes may take shellfish from the Growers' staked or cultivated beds, the Ninth Circuit's holding still is in direct conflict with this Court's opinions. The Ninth Circuit in this case broadly construed the tribes' easements as extending to every inch of private and public property along 2227 miles of Puget Sound's shoreline. The treaties in this case, however, limit the right of taking fish to "all usual and accustomed grounds and stations." In *Seufert*, 249 U.S. at 199, which addressed the same treaty as *Winans*, this Court held that this "usual and accustomed" language meant that the tribes' easement ("servitude")

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[6] *Winans* concluded that the Yakama Treaty was "plain" enough to overcome the strong presumption against creating shoreland easements at specific sites on the Columbia River. But the Yakama Treaty does not contain a Shellfish Proviso. App. at B37-38 (noting that Yakama Treaty does not contain the Proviso because the tribe is from inland Washington, far from Puget Sound). *Winans* does not answer the distinct question of whether these treaties, which do contain the Shellfish Proviso explicitly barring Indian harvest from "any beds staked or cultivated," still allow a conclusion that the United States intended a "very plain" grant of easements to millions of acres of Puget Sound.

> is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.

Seufert requires that the tribes bear the burden of proving their claimed easements at specific locations from which the Indians "habitual[ly] and customar[ily]" took shellfish. *Id.* Without citation to any authority, and directly conflicting with *Seufert*, the Ninth Circuit relieved the tribes of their burden because "it would be extremely burdensome and perhaps impossible for the Tribes to prove their usual and accustomed grounds on a species-specific basis." App. at A20.[7]

The Ninth Circuit's failure to hold the tribes to their *Seufert* burden more broadly conflicts with the basic principle of the equal footing doctrine that the scope of easements claimed in derogation of a future state's title

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[7] The Ninth Circuit imposed the 2227-mile easement because it said that the usual and accustomed areas for taking *immobile* shellfish were coextensive with the broad areas of Puget Sound earlier decided to be the usual and accustomed areas for taking *free swimming* salmon. App. at A20. In his concurrence, Judge Beezer deemed this reasoning "perplexing," but thought it mandated by the law of the case. App. at A43. As the State of Washington's Petition explains, this conclusion was incorrect. In fact, imposing the 2227-mile easement places the Ninth Circuit's decision squarely in conflict with *Winans* and *Seufert*.

to land under navigable waters must be construed as narrowly as possible. *Shively*, 152 U.S. at 10; *Massachusetts*, 271 U.S. at 89. Thus, even if the United States granted easements to the tribes, the equal footing doctrine still must be applied so that the scope of any such easements are narrowly construed. *Id.* The way to construe the easements narrowly is to require the tribes to meet their burden of showing the specific locations that were their usual and accustomed locations for taking shellfish. *Seufert*, 249 U.S. at 199.

III. LACHES SHOULD BAR THE CLAIMS.

The tribes' claimed right to enter upon private tidelands and to take shellfish from the Growers' farms lay fallow for 135 years, only to be summoned up to defeat generations of labor and investment. In light of the long delay, during which time expectations regarding the exclusive possession of property became ever more settled, the tribes' claims against the Growers should be barred by the doctrine of laches. The Ninth Circuit rejected the Growers' laches argument because this Court has not yet accepted laches as a defense to an Indian treaty claim, but noted that the "equities do weigh heavily in favor of the Growers." App. at A28.

This Court has left as an open question whether Indian rights in land may be defeated under the equitable doctrine of laches. *Oneida*, 470 U.S. at 244 (refusing to address laches but stating in dictum that "it is questionable whether laches properly could be applied" to defeat Indian title). Four members of this Court argued in dissent in *Oneida* that laches should be available to bar a claimed tribal right in land if interests and investments in property are settled. *Oneida*, 470

U.S. at 255 (Stevens, J., joined by Rehnquist, J., dissenting). This Court should resolve this important question, which affects not only the Growers and other petitioners, but millions of other people in the Ninth Circuit and other circuits who are potentially subject to having settled property interests upset by assertion of long dormant treaty rights in their lands.

The Growers' reasonable reliance on the right to exclude all others from their farms is not disputed. Not once in the 135 years since the treaties were ratified did any Indian--or anyone else--claim the right to enter the Growers' cultivated shellfish farms and take the Growers' crops. For one of the Growers, title dates back to the 1860s, with not a word of protest from the Indians, from the state or from the United States until this action was filed in 1989. App. at C3 (the "Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property").

It is undisputed that all the Growers invested their money, their labor, and their lives in their farms in reasonable reliance on their ability to exclude all others from entering their farms and taking their crops. The Growers' investment and labor in their farms, sometimes for generations, are now imperiled by the Ninth Circuit's judgment, and the prejudice to them is patent if the tribes are allowed to enter their farms and take a portion of their crops. That these facts would bar any normal claim under the doctrine of laches is not contested.

These facts call for application of laches to the long ignored claim of these tribes. As noted by Justice Stevens' dissent, the failure to apply laches under these

circumstances "is an unprecedented departure from the wisdom of the common law." *Oneida*, 470 U.S. at 256.

> The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity in titles to real estate. Labour is paralysed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals.

Lewis v. Marshall, 30 U.S. (5 Pet.) 470, 477-78 (1831).

CONCLUSION

The writ should issue.

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